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No. 03-731

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL JEFFERSON,

Petitioner,

vs.

CITY OF OMAHA POLICE DEPARTMENT, OFFICER PATRICK McCASLIN, Individually and in His Official Capacity, and THE CITY OF OMAHA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari of the Plaintiff Michael Jefferson appears to raise the following three questions:

1. Did the Court of Appeals correctly find that the Defendants' issuance of a citation to Plaintiff complied with the Fourth Amendment?

2. Did the Defendant Police Officer Patrick McCaslin ("McCaslin") act as a municipal policymaker in his actions regarding the citation issued to Plaintiff; and if so, did his actions cause any constitutional violation?

3. Did the Court of Appeals properly affirm the dismissal of Plaintiff's equal protection claim, based on alleged selective prosecution based on race?

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CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Contrary to Plaintiff's assertions at p. 2 and other places in his Petition, the relevant city ordinance is found at Omaha Municipal Code § 20-83, not 20-93. § 20-83 states as follows:

> It shall be unlawful for any person to coax or entice or attempt to coax or entice any child under 16 years of age into any vehicle unless licensed or privileged to do so.

NEB. REV. STAT. § 14-602 (Reissue 1997) states as follows:

> The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the superintendent of police. All orders relating to the direction of the police force shall be given through the chief of police or, in his absence, the officer in charge of the police force.

Omaha Home Rule Charter § 3.11(1) states as follows:

> The public safety functions shall be performed by the following three departments: The Fire Department headed by the Fire Chief, the Police Department headed by the Police Chief, and the Communications Department headed by the Communications Chief. Each of these three department heads shall be in the classified service, notwithstanding any provision of the Home Rule Charter to the contrary.

STATEMENT OF CASE

The Plaintiff Michael Jefferson filed this action under 42 U.S.C. § 1983 against the City of Omaha, its Police Department, and Omaha Police Officer Patrick McCaslin (collectively the "Defendants"). Plaintiff alleges that a criminal citation issued to him by the Defendants violated the Fourth Amendment and was racially discriminatory in violation of the Equal Protection Clause. The Defendants answered, denying liability. The Defendant McCaslin alleged that he was protected by qualified immunity.

The facts of this case are set forth in the affidavits and depositions filed in the record.[1] This matter began when a boy reported to Omaha Police Officer Reginald Gunter that a man had tried to entice him and another boy into the man's vehicle. The boy described the suspect as a black male, driving a red pick-up truck. The boy stated that he recognized the suspect as the area's regular newspaper carrier. The boy had also taken note of the license plate of the red pick-up truck and reported that to Gunter. The boy's mother told Gunter that the boy was generally trustworthy. Gunter also spoke with the other boy whose story essentially matched the story told by the first boy. (App. pp. 166-169).

Gunter learned that the license plate number identified by the boy belonged to a red pick-up truck owned by the Plaintiff. Gunter went to the Plaintiff's house.

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[1] References to pages of the appendix before the Eighth Circuit Court of Appeals shall be denoted by "App. p. ___."

At the Plaintiff's house, Gunter told Plaintiff that there had been an allegation and asked if he could talk to him. Plaintiff invited Gunter to enter the house. Gunter entered and told Plaintiff of the allegations. Plaintiff confirmed that he was the regular newspaper carrier for the area and that he owned the red pick-up truck in question. Plaintiff stated that he did encounter two white male children that day on his route but denied that he had offered them a ride. (App. pp. 166-169).

Gunter then phoned the Defendant McCaslin, who was a sergeant with the Child Victim Sexual Abuse Unit. Gunter briefed McCaslin on the facts of the case. McCaslin advised Gunter to issue a ticket citation to Plaintiff for two counts of enticement under Omaha Municipal Code § 20-83.[2] (App. pp. 144-149, 166-169).

Gunter told Plaintiff that he would issue him a ticket citation. He asked Plaintiff to come out to his car because his ticket book was there. Plaintiff agreed, did so, and received the ticket in Gunter's car. Gunter did not handcuff Plaintiff, nor take him into physical custody, nor transport him to Central Police Headquarters, nor have him booked on charges. (App. pp. 166-169).

Prior to this incident, McCaslin had recently heard of two incidents in which a man in a red pick-up truck had allegedly attempted to pick up children in the Omaha

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[2] In Plaintiff's Brief at p. 2 and other places, Plaintiff continues to erroneously state that Omaha Municipal Code § 20-93 was the basis for the citation. The uncontradicted evidence in the record shows that § 20-83 was the basis for the citation. See App. pp. 146, 168, 187.

area, one of which occurred in this same area of the City. (App. p. 146).

The day after the citation, one of the boys' parents called McCaslin and told him that the boy had confessed to making up the incident. Later, the other boy's parent also confirmed the falsehood of the allegations. The Defendants immediately voided the Plaintiff's enticement citation. (App. pp. 147-148).

In a March 12, 2002, Order, the district court entered summary judgment in favor of McCaslin on both the Fourth Amendment and Equal Protection claims. In dismissing the latter claim, the district court found that "McCaslin's decision to cite the Plaintiff was not based on the Plaintiff's race but on the objective facts developed during the investigation of the boys' report." The court found that McCaslin was qualifiedly immune from the Fourth Amendment claim, because he had at least "arguable" probable cause to conclude that the Plaintiff violated the law. See Petition for Writ of Certiorari, pp. 17a-31a.

In a July 10, 2002, Order, the district court dismissed the remaining Fourth Amendment and Equal Protection claims against the City and against McCaslin "in his official capacity." In this regard, the district court found that the Plaintiff failed to show that the citation was the "result of an unconstitutional official policy or widespread custom." Petition, p. 13a.

On appeal, the Eighth Circuit Court of Appeals affirmed the summary judgments granted by the district court. The Court of Appeals questioned whether the issuance of the citation was a "seizure" entitled to Fourth Amendment protection. *Jefferson v. City of Omaha Police Department*, 335 F.3d 804, 806 (8th Cir. 2003). The court

said that even if it was, "it was certainly a reasonable one." *Id.* at 807. On the Equal Protection claim, the Court of Appeals noted that Plaintiff had failed to prove any discriminatory effect and any discriminatory purpose. *Id.*

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT THE ISSUANCE OF A CRIMINAL CITATION TO PLAINTIFF DID NOT VIOLATE THE FOURTH AMENDMENT.

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Plaintiff's Petition does not explicitly identify which of these considerations are applicable here. Rules 10(a) and (c) refer to Court of Appeals' decisions on "important" federal questions and other matters.

Most notably, Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law."

The latter is the situation here, regarding the Plaintiff's Fourth Amendment claim. At p. 8 of his Petition for Writ of Certiorari, Plaintiff argues that "[t]he Court of Appeals' reasoning that there was reasonable suspicion to detain Plaintiff flies in the face of stubborn fact." He alleges that the Court of Appeals erred "when viewing the facts of the present case in the light most favorable to the Petitioner." Petition, p. 7. In attacking the district court's view of the facts, Plaintiff argues that "[t]he District Court's analysis as applied to the present case of 'arguable probable cause' is erroneous when the facts are viewed in the light most favorable to Mr. Jefferson." Petition, p. 11.

These arguments sound very much like complaints of "erroneous factual findings" or the "misapplication" of law. Plaintiff's Petition merely reargues the facts.

However, Plaintiff's Petition does not contest the "reasonable suspicion" standard applied by the Eighth Circuit Court of Appeals. See *Terry v. Ohio*, 392 U.S. 1, 16-19, 30 (1968); *Knowles v. Iowa*, 525 U.S. 113 (1998) (citation situation is distinguished from custodial arrest situation, for purposes of permissibility and scope of attendant search). To the contrary, on several occasions in his Petition Plaintiff himself states that the "reasonable suspicion" standard is applicable, while arguing that the facts did not meet that standard. See Petition, pp. 7-10. Indeed, Plaintiff sums up his argument on this issue at p. 10 by stating that "the officers did not have sufficient reasonable suspicion to believe that Mr. Jefferson had violated the enticement ordinance."[3] Thus, Plaintiff's Petition for Writ of Certiorari asserts nothing more than "erroneous factual findings" or the "misapplication of a properly stated rule of law." Pursuant to Supreme Court Rule 10, certiorari is "rarely granted" under those circumstances. Accordingly, certiorari should not be granted on this issue.

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[3] Plaintiff also tries to contest the *district court's* use of an "arguable probable cause" standard, triggered by McCaslin's claim of qualified immunity. See Petition, pp. 10-13. However, the *Court of Appeals* opinion did not apply nor discuss any arguable probable cause standard, nor any issues of qualified immunity. Rather, the Court of Appeals applied the reasonable suspicion standard which, as noted above, Plaintiff apparently concurs with. Since Plaintiff attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (see Petition, p. 2), it is the decision of the Court of Appeals, and not the district court, which is relevant here.

In the alternative, even if this Court were inclined to delve into the factual merits of the Fourth Amendment claim, there is ample evidence in the record to support the Court of Appeals' finding of reasonable suspicion. Two different victims/witnesses were separately interviewed by police officers and gave consistent stories on what happened. They positively identified the Plaintiff as the perpetrator. At his interview, Plaintiff himself admitted to being in the area at the relevant time and encountering two young boys. His only dispute was what he said to them.

As it turned out, this was not a case of misidentification. Plaintiff admitted to being in the area, and the boys correctly identified him. Rather, as the boys later confessed, the only falsehood was as to what Plaintiff said to them.

The Court of Appeals correctly noted that "the facts in the present case are virtually indistinguishable from those in *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1263-66 (8th Cir. 1996) cert. denied, 519 U.S. 867, 136 L.Ed.2d 119, 117 S.Ct. 179 (1996)." *Jefferson*, 335 F.3d at 807. In *Brodnicki*, the Court of Appeals found that similar enticement allegations by a nine-year-old child supported full probable cause for an arrest. Logically, the similar allegations in the present case easily meet the lower standard of reasonable suspicion.

Furthermore, this lower standard of reasonable suspicion should be lowered even further, given McCaslin's plea of qualified immunity. Qualified immunity shields a government official from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable

person would have known. *Wilson v. Layne*, 526 U.S. 603, 609 (1999), quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Wilson*, 526 U.S. at 615. The qualified immunity test is separate and distinct from the test of whether there was an underlying constitutional violation. See *Saucier v. Katz*, 533 U.S. 194, 200-207 (2001). The "clearly established" test asks whether there are "any cases of controlling authority in [Plaintiff's] jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" or a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson*, 526 U.S. at 617.

Under the facts of the present case, McCaslin did not violate the law that was "clearly established" in the Eighth Circuit at the time. The clearly established law at that time was the factually indistinguishable *Brodnicki* case. In *Brodnicki*, the Eighth Circuit found full probable cause, under similar facts. Not only did *Brodnicki* clearly and effectively negate any supposed "clearly established right" of the plaintiff to be free from a citation under such facts – *Brodnicki* goes further and indicates that there was full probable cause (and, logically, reasonable suspicion) under such facts.

For all of the foregoing reasons, a writ of certiorari should not be granted on the Plaintiff's Fourth Amendment claim.

II. THE DEFENDANT McCASLIN WAS NOT A MUNICIPAL POLICYMAKER; AND IN ANY EVENT, HIS ACTIONS DID NOT CAUSE ANY CONSTITUTIONAL VIOLATION.

Plaintiff tries to resuscitate his Fourth Amendment claim by characterizing McCaslin as a policymaker. See Petition at p. 13. However, under applicable state and local law, McCaslin did not act as a municipal policymaker in having a citation issued to Plaintiff; and even if he was a policymaker, the Eighth Circuit Court of Appeals correctly ruled that there was no constitutional violation anyway.

Being stymied in his claim against McCaslin individually, Plaintiff presumably seeks to pursue liability under this "policymaker" theory, against the City or against McCaslin in his official capacity.[4]

A city cannot be liable under 42 U.S.C. § 1983 unless some city policy or custom is responsible for the deprivation of constitutional rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978). A plaintiff must not only identify the improper policy or custom; he must also "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident

[4] An official capacity suit represents only another way of pleading an action against an entity of which an officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-824 (1985). Only those municipal officials who have "final policymaking authority" may by their actions subject a city to such § 1983 liability. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

An initial problem with Plaintiff's policymaker argument is that there still was no constitutional violation. Plaintiff's attempt to characterize McCaslin as a policymaker is irrelevant because there was no constitutional violation. As correctly noted in the Court of Appeals' opinion, the facts of the present case met the reasonable suspicion standard – a standard of law concurred with by the Plaintiff in his Petition, as noted above.

Proof of some allegedly unconstitutional policy or custom is irrelevant unless there has been an actual constitutional violation. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), this Court stated as follows:

> [None] of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

(Emphasis in original.) Thus, even if McCaslin was somehow "setting a policy" in having a citation issued to Plaintiff, without an underlying constitutional violation such a purported policy is "quite beside the point."

Furthermore, McCaslin simply was not a policymaker. Only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *St. Louis v. Praprotnik*, 485 U.S. at 123. Whether a particular official has "final policymaking authority" is a question of state law. *Id.* This question of state law is itself "a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Reviewing "state and local positive law," the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular violation. *Id.* See, e.g., *St. Louis v. Praprotnik,* 485 U.S. at 126, 130, (the U.S. Supreme Court looked to the St. Louis city charter to identify the final policymakers with respect to personnel administration, and held that "[s]imply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy.")

Similarly, McCaslin's decision to issue a criminal citation was not in any sense a "policy statement . . . approved by the supervising policymaker," or a "series of decisions" manifesting a "custom or usage" of which a supervisor must have been aware. *Id.* McCaslin's affidavit identifies the limited scope of his supervisory duties. (App pp. 144-145). McCaslin was not authorized to make or determine any policies or standard operating procedures for the Omaha Police Department nor for its Child Victim Unit. (App. p. 149). Any such proposed policy or standard operating procedure had to be approved by the chief of

police. *Id.* Omaha Police Chief Don Carey states the same thing in his affidavit. (App. pp. 188-189).

Police chiefs, sheriffs, and police superintendents are often found to be the final policymakers with respect to issues involving their departments. See, e.g., *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992). However, police officers making arrest decisions are not seen as "final policymakers." See, e.g., *Eversole v. Steele*, 59 F.3d 710, 716 (7th Cir. 1995) (arresting police detectives who "held position of authority" nevertheless were not policymakers; noted state statute giving police chief "exclusive control" over department); *Clark v. City of Lake St. Louis*, 735 F.Supp. 333, 335-336 (E.D. Mo. 1990) (even an arresting police chief held not to be the final policymaker); *Latuszkin v. City of Chicago*, 250 F.3rd 502 (7th Cir. 2001) (holding that police department superior officers and supervisors did not qualify as policymakers for the city); *McGautha v. Jackson County*, 36 F.3d 53, 56 (8th Cir. 1994) (holding that decision-making discretion cannot be equated with policymaking authority; supervisors were non-policymakers as defined by Missouri law).

While McCaslin was undoubtedly not a final policymaker for the City, the identity of the final policymaker is established by "state and local positive law" – Nebraska statutes and the Omaha Home Rule Charter. Nebraska state law makes the City's police chief the final policymaker with respect to his department. The police chief's authority is defined at NEB. REV. STAT. §§ 14-601 through 14-609. In particular, § 14-602 states:

> The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the superintendent of police. All orders

> relating to the direction of the police force shall be given through the chief of police or, in his absence, the officer in charge of the police force.

This language, similar to that in the Indiana statute described in *Eversole*, above, effectively defines the police chief as the final policymaker for the Omaha Police Department, under state law. Similarly, Omaha Home Rule Charter § 3.11 (App. p. 221) identifies the police chief as the head of the police department. Plaintiff failed to prove that any deprivation of rights was caused by any policies set by any final policymaker.

In summary, the record does not support Plaintiff's characterization of McCaslin as a policymaker. Furthermore, even if McCaslin was somehow a policymaker, that status is irrelevant because there was no constitutional violation.

III. PLAINTIFF'S EQUAL PROTECTION CLAIM WAS PROPERLY DISMISSED BECAUSE THERE WAS NO EVIDENCE OF RACIAL DISCRIMINATION.

Plaintiff's Equal Protection claim is based on nothing more than conclusory allegations and generic arrest statistics that prove nothing on this issue.

To establish a claim for selective prosecution, a claimant must demonstrate that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Id.* To show discriminatory purpose, the claimant must show that race was a motivating factor in

the decision. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977).

The Court of Appeals' opinion in this case cited and applied these same rules. See *Jefferson*, 335 F.3d at 807. The Court of Appeals' opinion correctly cited the rule from *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996), cert. denied, 519 U.S. 955 (1996), which in turn correctly cited the aforesaid rule from *Armstrong* and other cases.

Significantly, Plaintiff's Petition for Writ of Certiorari does not appear to contest the law on the selective enforcement claim, as stated and applied by the Eighth Circuit panel. See Petition, pp. 15-17. Thus, there appear to be no grounds under Supreme Court Rule 10 for granting writ of certiorari on this claim. To the contrary, Plaintiff merely reargues the facts, pointing only to a variation from normal investigation procedures, and generic arrest statistics. Petition, pp. 15-16. Again, these asserted errors are nothing more than allegations of "erroneous factual findings or the misapplication of a properly stated rule of law" – matters for which certiorari should be "rarely granted," under Supreme Court Rule 10.

Even if this Court were to delve into the merits of this claim, the record is devoid of any evidence of discriminatory effect or purpose.

There is no evidence that race was a motivating factor in McCaslin's citation decision. The boys told police that the enticement was committed by the newspaper carrier for the area; Plaintiff was in fact that newspaper carrier. In any event, the boys' identification of Plaintiff turned out to be accurate. It was the rest of their story that was fabricated. In other words, Plaintiff was cited, not because

he was an African-American, but because a number of other characteristics of the described suspect all pointed to him – with greater specificity than his race – and that identification of Plaintiff turned out to be correct (App. pp. 148-149). Despite Plaintiff's speculative conjecture to the contrary, Plaintiff was not cited because of his race. He was cited because the boys specifically identified him, and lied about what he did.

Plaintiff argues that the Defendants varied in their investigative procedure. However, there is absolutely no evidence in the record that any such variance was connected in any way with the Plaintiff's race. To the contrary, the only evidence in the record on this issue is McCaslin's testimony that certain interview steps were not taken because he had no detectives available that day. (App. pp. 97, 100).

As was noted in *Armstrong*, supra, 517 U.S. at 465, a selective prosecution claimant must prove both discriminatory purpose and discriminatory effect. The lack of evidence of discriminatory purpose bars this claim.

In addition, this claim is also barred because Plaintiff has failed to offer any proof of discriminatory effect. There is no evidence in the record that, in the words of *Armstrong*, "similarly situated individuals of a different race were not prosecuted." *Id.* This is not a case of police seizing an African-American while disregarding some similarly situated white suspect. There is no evidence of any white persons committing enticement and not being cited for crimes.

Plaintiff's arrest statistics (App. p. 106) proved nothing on this issue. Without a racial breakdown of convictions, it cannot be said that the racial breakdown of

arrests is or is not appropriate. They are a statistical non sequitur. The Court of Appeals' opinion correctly characterizes this as "generic evidence," which "does not indicate a discriminatory effect" in arrests generally, nor with respect to the specific ordinance at issue. *Jefferson*, 335 F.3d at 807.

In summary, Plaintiff's Petition for review of the Equal Protection claim only reargues the facts and does not contest the legal standards applied. In any event, the facts do not support such claim.

CONCLUSION

Plaintiff's Petition for Writ of Certiorari complains of the Eighth Circuit Court of Appeals' handling of three issues:

1. Compliance with the "reasonable suspicion" standard under the Fourth Amendment;

2. The failure to find that McCaslin was a municipal "policymaker"; and

3. The rejection of the selective prosecution claim.[5]

In all three of these issues, Plaintiff merely reargues the facts or argues the misapplication of the law to the facts. Plaintiff does not contest the material legal standards

[5] As noted above, Plaintiff's complaint about the "arguable probable cause" standard used by the district court need not be addressed, since the Court of Appeals did not use that standard in its disposition of the Fourth Amendment claim.

applied by the Eighth Circuit Court of Appeals on these issues. Following the guidelines of Supreme Court Rule 10, the Petition for Writ of Certiorari should be denied. Furthermore, the Petition should be denied because Plaintiff's assigned errors are unsupported by the record and lack merit.

Respectfully submitted,

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